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No. 231

In the Supreme Court of the United States

OCTOBER TERM, 1962

VERNON KIRKPATRICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 221

VIRGINIA MILANOVICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20–27), as amended by the order of that court, dated June 4, 1962 (Pet. App. 18–19), is not yet reported. The original opinion of the court of appeals appears at Pet. App. 10–17. The opinion of the trial court (Pet. App. 1–9) dated March 10, 1962, denying a motion for a new trial is not reported.[1]

[1] The designation "R." refers to the 6-volume record on the merits, in No. 8493, United States Court of Appeals for the Fourth Circuit; "N.T.R." refers to the 5-volume record with respect to a new trial, in No. 8613 in the same court; "App." and "II App." (as distinguished from reference to the appendix to the petition as "Pet. App.") refer to the printed ap-

JURISDICTION

The judgments of the court of appeals with respect to the appeals in Nos. 8493 and 8613 were entered on April 30, 1962 (6 R. 14; 5 N.T.R. 10). On May 24, 1962, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including June 30, 1962, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner consented to the search of the house occupied by her and her husband and whether, in any event, the search was a lawful incident of the arrest of the husband and another man in the house.

2. Whether a motion for a new trial based on incidents having to do with pre-trial publicity was properly denied.

RULES INVOLVED

Federal Rules of Criminal Procedure:

RULE 33. NEW TRIAL.

* * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5

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pendices to appellant's brief and appellee's brief, respectively, these appendices appearing in this Court in a separate volume titled "Transcript of Record." As to these appendices, our references are to the original printed pagination, rather than to the pagination stamped on a portion of the appendices.

days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

RULE 41. SEARCH AND SEIZURE.

* * * * *

(e) *Motion for Return of Property and to Suppress Evidence.*

* * * The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

Petitioner, her husband, and others were tried in December 1958, in the United States District Court for the Eastern District of Virginia on an indictment charging larceny and receiving goods stolen from a safe at a United States Navy base. Petitioner's conviction was set aside in this Court because of failure of the trial court to restrict the jury's verdict to only one of the two offenses. *Milanovich* v. *United States*, 365 U.S. 551. The conviction of Mike Milanovich on a single count was affirmed, and two of the others involved in the theft pleaded guilty (4 R. 242–243; 333–334). Petitioner was therefore retried alone. She was found guilty of larceny and sentenced to imprisonment for ten years.

1. *The motion to suppress:*

On the second day of the trial, petitioner moved to exclude evidence which had been taken at the time of her husband's arrest and which had been received

without objection at the first trial. The trial court, adverting to the fact that no motion to suppress had been made before either trial, although the date of retrial had been fixed many weeks before (App. 5–6), nonetheless proceeded to hear evidence on the issue out of the presence of the jury.

The evidence showed that on the morning of June 19, 1958, agents of the Federal Bureau of Investigation, pursuant to a warrant for the arrest of Mike Milanovich, went to the house in Norfolk, Virginia, occupied by the Milanoviches and arrested Mike Milanovich and one Clayton Grimmer, who was also there. One of the agents "talked to Mike and his wife [petitioner]" and asked "them" for permission to search the house (App. 1–2, 7, 20, 22).[2] Mike Milanovich, in petitioner's presence, signed a written form consenting to the search (App. 2–3, 25).[3] Petitioner made no objection and "was very cooperative. They were both cooperative" (App. 2). Thereupon, the agents searched the house. Two other persons, Clayton Grimmer and Millie Gauger, were also in the house (App. 5, 6, 10). In the bedroom occupied by Millie Gauger, the agents found a suitcase containing two pistols and silver coins, some of the coins still in the bank wrappers (App. 12, 26–27, 33, 37). An overnight or week-end bag was found in a closet off

[2] We believe petitioner to be in error in stating (Pet. 14) that "no evidence was offered suggesting that the accused was asked to consent to the search of her home or personal belongings."

[3] Petitioner had claimed that she was not present in the room at the time Mike Milanovich signed the consent to search (App. 4).

the dining room, containing silver coins (also in part in the bank wrappers) and a smaller zipper handbag (App. 27, 30, 33–34, 39). When agents asked petitioner about the overnight bag she denied possession thereof, stating that she had loaned the bag the night before to Millie Gauger, and that the suitcase was Grimmer's (App. 16, 28, 30). The district court ruled that petitioner had shown no excuse for late filing of the motion to suppress, and that, in any event, "the search of the premises was in all respects legal" and the evidence admissible (App. 23–24). The Court of Appeals affirmed, holding that there was no explanation for the failure to comply with Rule 41(e) and also indicating its agreement with the district court's alternative ground of decision (Pet. App. 22–24).

2. *The motion for a new trial.*

On September 18, 1961, a week prior to the commencement of the instant trial, a Special Assistant to the Attorney General, who was also a practicing attorney in Richmond, Virginia, was at the office of one Louis H. Peterson, owner of a Norfolk radio station and a client of the attorney. During the course of conversation, Peterson asked the attorney what had brought him to Norfolk, and the attorney replied that he was on the case involving petitioner. Thereupon Peterson asked him to give the station's news editor, Wynn Moore, an item on the case for broadcast. The attorney stated that he could "give no more than factual information that was common knowledge" (4 N.T.R. 4–6).

On the evening of September 18, 19[illegible], Moore referred to the case in four broadcasts, the text of which was shown to be as follows (1 N.T.R. Affidavit of Moore, December 27, 1961, Exhibits 1 and 2; 1 N.T.R., Order, March 10, 1962, pp. 2–3; 4 N.T.R. 16–179):

> A woman with a long record of arrests on charges of prostitution and liquor sales comes to trial Monday in Federal Court to face robbery charges for the second time. Virginia Milanovich, alias Caufman, alias Russo and several others, will be retried on charges of burglary and receiving stolen goods from the Commissary at the Little Creek Amphibious Base in 1958. The first trial found her guilty of both charges but the Supreme Court reversed the decision saying that the jury should have been instructed to bring in a verdict of guilty on only one of the charges. The case has been made more difficult by the murder of one of the witnesses. Chris Sofocleous, one of the thieves, turned states evidence and was later killed when his car was bombed in the prescribed gangland style. WNOR News has learned that the prosecutor, Joseph Bambacus, Special Assistant to Robert Kennedy, will attempt to have the transcript of the Sofocleous testimony entered and word has it that the evidence will be accepted. We tried to get confirmation of this from Mr. Bambacus with this result . . .

On September 21, 1961, four days prior to commencement of the instant trial, petitioner filed a civil action in Norfolk because of the broadcasts (1 N.T.R.

Exhibit 1 to Government Memo in Opp.; 4 N.T.R. 25–26).[4]

On the first day of the instant trial, September 25, 1961, the court questioned the jurors in detail as to any knowledge of the case (3 N.T.R. 1–H–Z; AA–BB) and, specifically, as to "any broadcasts on the radio" (3 N.T.R. 1–I). None of the jurors had heard the broadcasts. The judge excused four jurors who had read of the case in newspapers (3 N.T.R. 1–J, M–N, P, Z–AA). Petitioner exercised only two of her peremptory challenges (3 N.T.R. 1–Y), and agreed that the jury was acceptable (3 N.T.R. 1–BB).[5] Thereafter, the trial judge, in chambers, discussed with counsel and petitioner "some publicity in advance of this trial", and referred to "a newspaper account, which indicates it was published in some paper on September 22, 1961, and it has the headlines 'Suspect Sues for Libel' ". The judge requested the views of counsel and petitioner as to (1) whether the jury should be locked up during the trial, and (2) any additional suggestion defense counsel "or defendant" might have (3 N.T.R. 1–UU). Petitioner and her counsel, while making detailed suggestions on other matters, *e.g.*, segregation of witnesses (3 N.T.R. 1–UU–AAA), recommended that the jury not be locked up (3 N.T.R. 1–VV), and made no suggestion of any further precautions with respect to the prior broadcasts or libel action.

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[4] Petitioner took a nonsuit in the case on January 15, 1962 (4 N.T.R. 26).

[5] Alternate jurors were excused at the end of the trial without serving (1 R. 46).

No motion was made for adjournment, change of venue or a new trial by reason of the broadcasts, before trial or within the 5-day period subsequent to the verdict on September 29, 1961. The instant motion was filed on December 22, 1961, based on a claim that petitioner had just learned that the government prosecutor was the source of the information. In the hearing on the motion, on February 9, 1962, petitioner relied solely upon the *ex parte* deposition and affidavit of Moore, which recited the conversation with the government attorney as the source of the information for the broadcasts (1 N.T.R., Deposition, Nov. 30, 1961, Affidavit, Dec. 27, 1961; 4 N.T.R. 2). The government presented the testimony of the owner of the radio station and the original court record in the civil libel action (4 N.T.R. 4 *ff.*).[6]

The trial court ruled that the motion, if considered with respect to the substantive issue of guilt, was out of time, since petitioner's knowledge of the broadcasts was not a fact newly discovered after the trial, and petitioner made no showing that the government attorney's supplying of information could not have been discovered before or during trial by diligence on petitioner's part. The court reviewed the extensive questioning of the jury on *voir dire* and the requests made by the court that petitioner and her counsel suggest any additional steps in assuring the jury's proper

[6] The government attorney was unable to appear because of illness (4 N.T.R. 28).

functioning, and concluded (4 N.T.R. Opinion, March 10, 1962, p. 8; Pet. App. 8–9):

> [N]o member of the jury even knew that the broadcasts had been made, and * * * the broadcasts in no way affected the purity of the trial. The defendant has not even attempted to make a contrary showing.

The court of appeals affirmed the denial of a new trial. While criticizing the supplying of information to a radio station by a prosecutor, the court found that petitioner "has had her day in court before a jury whose fairness she herself does not impugn" (5 N.T.R. 2–14; Pet. App. 24–28).

Petitioner alleges (Pet. 11) that the court of appeals, subsequent to the filing of its original opinion on April 30, 1962, permitted the government attorney to appear before it with respect to language critical of him in the opinion. Upon his appearance before the court in chambers, counsel for petitioner was present, as also the owner of the radio station, counsel for the government, and counsel for the attorney who had been criticized. Thereafter, by order of June 4, 1962, the court of appeals amended its prior opinion by eliminating a reference to whether the supplying of information for the broadcast called for disciplinary action by the district court, and by adding a reference to the government attorney's statement to the court of appeals that he had given no information to the radio station that it did not already possess (5 N.T.R. 13–14; Pet. App. 18–19).

ARGUMENT

1. The motion to suppress the evidence of stolen currency found in the home of petitioner and her husband was properly denied by the trial court. As both courts below pointed out, the motion could properly have been denied because it was not timely filed under Rule 41(e), F.R. Crim. P. The only excuse offered for failing to move before the second trial was change of counsel, but new counsel had had a week before the second trial in which to raise the issue.

In any event, there was no illegality in the search. The record is undisputed that the search of the Milanovich home was made after the officers had talked to Mike Milanovich "and" petitioner and had asked "them" whether the officers could search the house (*supra*, p. 4), and after Mike Milanovich had signed a written consent-to-search form without objection on petitioner's part.[8] As observed by the court below, petitioner's acquiescence apparently was "part of a deliberate design on her part to cast full responsibility.

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[7] *Segurola* v. *United States*, 275 U.S. 106, 110–112; *United States* v. *Volkell*, 251 F. 2d 333, 336 (C.A. 2), certiorari denied, 356 U.S. 962; *United States* v. *Romero*, 249 F. 2d 371, 374 (C.A. 2); *United States* v. *Sheba Bracelets, Inc.*, 248 F. 2d 134, 142–143 (C.A. 2), certiorari denied, 355 U.S. 904; *United States* v. *Chieppa*, 241 F. 2d 635, 637–638 (C.A. 2), certiorari denied, *sub nom. Iricola* v. *United States*, 353 U.S. 973.

[8] There is authority holding that, even if petitioner had been absent, a search based on consent of her husband would have been valid. (See *Stein* v. *United States*, 166 F. 2d 851, 855 (C.A. 9), certiorari denied, 334 U.S. 844; *United States* v. *Sferas*, 210 F. 2d 69, 74–75 (C.A. 7), certiorari denied, *sub nom. Skally et al.* v. *United States*, 347 U.S. 935; and cases collected in 21 A.L.R. 2d 1078–1102).

for the presence of the stolen money upon either her husband or the house guest" (Pet. App. 24).

The search, moreover, was a lawful incident of the arrest of Mike Milanovich and Grimmer. Petitioner argues that the overnight bag was obviously a woman's piece of luggage—"obviously personal property and effects of the wife" (Pet. 14–15)—and therefore outside the scope of a search incidental to these arrests. But the two pistols and the loot found in a suitcase in the room occupied the night before by Millie Gauger confirm the reasonableness of the officers' assumption that luggage in the rooms might contain contraband. See *Carlo* v. *United States*, 286 F. 2d 841, 847–848 (C.A. 2), certiorari denied, 366 U.S. 944; *James* v. *United States*, 191 F. 2d 472, 473–474 (C.A. D.C.), certiorari denied, 342 U.S. 948. There was clearly a "plausible connection or relation" between the wife's overnight bag and the theft of quantities of silver (requiring bags) for which Mike Milanovich and Grimmer had been arrested. See *United States* v. *Moore*, 107 F. Supp. 393, 394 (S.D. N.Y.).

2. Petitioner takes no issue with the trial court's finding, made upon the basis of the trial court's in-

[9] Petitioner is incorrect in stating (Pet. 13) that the court of appeals did not consider the legality of the search as well as the question of timeliness of objection. The court of appeals, in distinguishing *Amos* v. *United States*, 255 U.S. 313, noted the violation of Fourth Amendment rights there, and characterized the instant facts, by contrast, as "far from clear", in showing a violation, the court adverting, *inter alia*, to petitioner's acquiescence in the search as part of a design to attribute possession of the stolen money to others (Pet. App. 24).

tensive *voir dire* examination, that none of the jurors had heard the radio newscast on the evening of September 18, 1961 (*supra*, pp. 7–9). Indeed, petitioner and her counsel evinced their complete confidence in the impartiality of the jury, finding it unnecessary to accept the court's suggestion for segregation of the jury during the trial. It was not until several months after sentence that petitioner claimed that misconduct of the government attorney, which had no effect on the trial, should vitiate the entire proceeding. In view of the fact that petitioner's trial was not at all affected by adverse publicity, there is no reason to reverse the conviction. Where it is shown that jurors have seen unfavorable publicity and the court must therefore judge whether a fair trial is possible, the courts have tended more readily to find the possibility of prejudice when the publicity is the result of a prosecutor's action. In *Henslee* v. *United States*, 246 F. 2d 190 (C.A. 5),[10] the court applied this doctrine to publicity occurring during the trial as the result of a prosecutor's action, even though no juror affirmatively admitted reading the articles in question. As to publicity occurring during trial, there could conceivably be some reluctance on the part of a juror, who has been told not to read newspapers or listen to broadcasts, to admit disobedience of the order, particularly where,

[10] The denial of certiorari in 359 U.S. 984 was not with respect to this decision but sustained a later trial (262 F. 2d 750), in which Henslee was found guilty.

as in *Henslee*, the question is merely addressed to the jury at large. Here, on the *voir dire*, each juror was questioned individually as to a broadcast which took place before trial. There is no basis whatever for supposing that the jurors would hesitate to answer truthfully the question whether they had heard it.

The action of the court of appeals in modifying its criticism of the government attorney involved is not a matter which concerns petitioner since the ruling as to petitioner remains the same—that reversal was not required, regardless of how the broadcast originated, because the impartiality of the jury was not affected. In view of the fact that the attorney involved had been ill at the time of the motion for a new trial, and therefore had not had an opportunity to testify, the court of appeals, which had severely criticized him and had suggested the possibility of disciplinary action, heard his side of the story in the presence of petitioner's counsel and counsel for the government. It thereafter modified the portion of its opinion which had suggested that disciplinary action might be appropriate. See Pet. App. 18–19. Petitioner's argument that the court of appeals took "unsworn testimony without the presence of the accused" (Pet. 12) ignores the fact that the hearing in chambers was addressed to a matter entirely discrete from the merits of petitioner's case (of which the court had already disposed)—that is, whether there was any occasion to suggest possible disciplinary action against an attorney.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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